

The Epochal Failure of the EU Commission

Maximilian Steinbeis

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Her name is Beata Morawiec and she is a judge. Not just any judge. She has been around for a long time, she has influence and experience. She is the president of [one of the two big judges' associations](#) in Poland. She has, also in this function, more than once clashed with the Polish government. Most of all with the Minister of Justice and his policy of discrediting the country's independent judiciary as a "caste", of forcing them under his thumb or replacing them with loyalists. In 2017 she was sacked as president of the Krakow District Court. The Minister of Justice had a vicious attack against her posted on his official website. She sued him for defamation and, [what's worse, she won](#). The Minister of Justice, however, is at the same time the head of the public prosecutor's office. So his prosecutors diligently created a case against Judge Morawiec and found a [telephone salesman](#) named Mirek B. who was willing to declare that Judge Morawiec had promised him a favorable outcome of a family lawsuit in return for a telephone he had given to her.

This Monday, Judge Morawiec's immunity was lifted. She was suspended from office and her salary was cut by half. This was decided by a judge of the same disciplinary chamber of the Supreme Court which, according to the European Court of Justice, cannot even be considered a court at all for its utter lack of judicial independence. If the decision holds, the Minister of Justice/Prosecutor General can and will now bring down the full penalizing power of the state on Judge Beata Morawiec.

The day after in Brussels, a spokesperson of the EU Commission was asked at a [press conference](#) how one thinks of this matter in Berlaymont. His answer: Are watching with concern how. Hope for more clarity when. Strongly emphasize the importance of. Are in intense dialogue with.

Baka, four and a half years later

This week, on the occasion of our [rule of law podcast](#), I had the pleasure to talk to [ANDRÁS BAKA](#), the long-time Hungarian judge at the European Court of Human Rights in Strasbourg and subsequently President of the Hungarian Supreme Court. Baka is probably the only former ECtHR judge who, as plaintiff, lent his name to a landmark decision of the Court, too: [Baka v. Hungary](#) from 2016, the human rights verdict of reference for everything going on in Europe regarding judicial independence. Baka had been removed from office by the Hungarian government majority in 2011 after he had spoken out against the planned forced retirement of a significant portion of Hungary's judiciary. This, according to the ECtHR, violated Baka's right to freedom of expression, among other things, and was generally likely to have a "chilling effect" on the judiciary.

Four and a half years later, this ruling has still [not been implemented](#) by Hungary. The power of the parliament to kick judges off the bench, along with the according chilling effect, still exists. The Council of Europe's Committee of Ministers, which oversees the implementation of the ECtHR rulings, has only just issued another [report](#) to that effect.

Every year there are reports on the implementation status of ECtHR judgments. Normally, this naming and shaming strategy is rather effective: Countries with shaky human rights situations usually can be counted on wishing to appear as halfway respectable members of the European community of states, and in that respect it's usually not helpful to get pummeled by the Committee of Ministers year in, year out with an ever longer list of persistent violations of the law. But this may well change at a time when other ECHR member states are getting away with literal murder for years on end without any progress at all, and when it's become a common part of political discourse in Great Britain, the Netherlands and Switzerland to reject the binding effect of human rights and obnoxious Strasbourg decisions altogether. What are you going to do? The ECHR is an international treaty, nothing more. There is no one who actually exercises power and could use it to enforce compliance with the law.

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The EU, however, is different. It has no police force and no executive power of coercion, to be sure. But it does have the Commission.

The guardian of the treaties, as they call it.

An independent institution. Aloof, detached, bureaucratic, not beholden to people and sovereign in its comfortable euro bubble, or so the common criticism goes.

Well, yes. Exactly.

The Commission, unlike the Council of Europe's Committee of Ministers, can take action and make sure that a member state which fails to comply with its obligations will get sanctioned. It can take the state to the ECJ if that's what it takes to avert damage from the Union. It can make it prohibitively expensive to leave the infringement unremedied. It doesn't even have to wait for a verdict in Luxembourg. It can apply for injunctions.

But it chooses not to. Instead: see above.

Systemic or general deficiencies

Meanwhile, in Luxembourg this week, a hearing has taken place in a case which deserves all our attention. It's topic is, once again, the EU arrest warrant or, more precisely, the question of whether and under what conditions people can still be handed over to the Polish judiciary if the arrest warrant could just as well be used for some political shenanigan of one kind or the other. What if the Polish Minister of Justice suddenly finds that Max Steinbeis is highly suspicious of having stolen silver spoons and has one of his brand new judges file a request with the Berlin court to arrest and ship me to Warsaw at the earliest convenience? Is the court in Berlin then obliged under EU law to do as requested regardless of the merits of the case?

The European Court of Justice [clarified](#) this in principle two years ago: The execution of the EU arrest warrant may be refused if A) there are "general or systemic deficiencies" in the judicial system of the state in question, and B) the person to be arrested would be under a specific risk of a violation of his or her fundamental rights. A is pretty much settled with the Commission's [reasoned opinion](#) on the Article 7 proceedings against Poland. But B is a [problem](#). If the entire judiciary is no longer independent, how is a poor judge in Enniskillen, Ciudad Real or Unna supposed to obtain reliable information about the independence of the very judge who issued the warrant? By asking the Polish Minister of Justice, perhaps?

All this has long been known and discussed over the last two years. In the meantime, right in the middle of their ongoing dialogue with the Commission,

the Polish government has decided to doubled down and enact the infamous “[muzzle law](#)“. While the Commission keeps on being concerned, considering stuff, emphasizing things and admonishing folks instead of finally launching infringement proceedings against this brutal kick in the teeth of the rule of law in Europe, as it would be its god-damned job, courts all over Europe have to execute Polish arrest warrants as if nothing were wrong and are [increasingly unwilling](#) to continue doing so. The Rechtsbank in Amsterdam has referred to the ECJ the question whether, against this background, Part B of the test can perhaps be dispensed with. This case was heard in Luxembourg this week, and John Morijn’s report, very much worth reading, can be found [here](#).

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The CJEU is doing what it can. But its possibilities are limited. To refuse to recognize judicial acts from states that subjugate their judiciary is a consistent, but risky strategy, especially for EU law itself. In the trajectory of this strategy, ultimately even referral decisions from Polish courts to the CJEU would appear no longer acceptable as a matter of course. If the principle of mutual recognition collapses, this would hit the EU community of law worst, which is probably the reason why the CJEU stuck to Part B in its test in the first place.

A general lack of trust is a hallmark of authoritarian regimes. No-one believes anything, nothing can be taken at face value, everything actually means something else and all reality is overgrown by a suffocating mold of lies. The PiS regime is centered around a [lie](#), and [so is](#) the Fidesz regime. You can’t trust anything or anyone, you have to constantly be afraid of being lied to and cheated on, and it is this distrust and fear that the regime feeds upon and keeps itself stable even when all other sources of legitimacy dry up.

The rule of law crisis in Poland and Hungary, in Bulgaria, in Malta, in Romania, at the EU external borders and God knows where else, has long since infested the European Union as whole – and thus all of us – and started to rot and disintegrate the supporting beams of the entire house. The institution responsible for this is not the Court of Justice, not the Parliament, and possibly not even the Council, whose

diplomatic approach in this crisis is regrettable but, to some extent, still somewhat understandable. It is the Commission. Its job is not to be diplomatic but to protect the treaties against those who break them. That's what it's there for. Its failure to do so may very well be what history will remember the EU Commissions of the 10's and their respective presidents Barroso, Juncker and von der Leyen for most.

The week on Verfassungsblog

Not only in Poland and Hungary, but also in **Spain** judicial independence has become an issue. [JORDI NIEVA-FENOLL](#) addresses the politicization of the judiciary and the deliberate blocking of the appointment of new members of the Supreme Judicial Body.

The latest coup of the PiS government in **Poland** regards the office of human rights ombudsman. Its holder, Adam Bodnar, had stubbornly and unrelentingly opposed the government's attacks against the rule of law throughout his term of office. That, however, has recently expired. In order to elect a successor, a majority in the Senate is needed, which is controlled by the opposition. Thus, under current statutory law, Bodnar remains in office as acting ombudsman for the time being. Now, however, some PiS MPs plan to use the constitutional court, a reliable tool of all which benefits PiS, to have that statutory law declared unconstitutional and thus get rid of Adam Bodnar. [MIROSŁAW WRÓBLEWSKI](#), the Director of the Constitutional, International and European Law Department of the ombudsman office, describes the problem. On 22 October, the Constitutional Court will hand down its judgment.

In **Hungary**, the government has also come up with a clever new scheme to make inroads on the independence of the judiciary. It is about the office that the aforementioned András Baka once held, namely that of president of the Supreme Court. [VIKTOR Z. KAZAI](#) and [ÁGNES KOVÁCS](#) describe what is going on and what the Orbán government is up to.

ANDRÁS BAKA was, as I said, one of my interlocutors in our and the German Bar Association's **rule of law podcast** this week, the topic of which was court organisation and procedural law: court packing, forced retirement and other manipulations of the procedural and organisational framework of the independent judiciary. MARIAROSARIA [GUGLIELMI](#), [ANDRÁS BAKA](#) and [CHRISTOPH MÖLLERS](#) discuss, among other things, how "good" judicial reforms can be distinguished from "bad" ones.

Speaking of court packing: [THEODOR SHULMAN](#) notes that Mitch McConnell, the Republican majority leader in the **US Senate**, may be a hypocrite but nevertheless deserves gratitude for the "cathartic effect on judicial nominations" his bad faith may ultimately have, and extends his sympathy also to SCOTUS nominee Amy Coney Barrett who, in the event of her confirmation, will have to carry a tremendous burden of responsibility on her shoulders for restoring the rock-bottom reputation of the Supreme Court.

Meanwhile, a draft law of the Federal Ministry of Justice caused a lot of excitement in Germany this week for using exclusively the **generic feminine** form. The Federal Ministry of the Interior, greatly attached to all things masculine in linguistics and otherwise, had the presumption to find that language discriminatory and unconstitutional, much to the mocking delight of [ANNA KATHARINA MANGOLD](#).

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3rd Rudolf Bernhardt Lecture – Professor Ba#ak Çal#:

”‘To me, fair friend, you can never be old’: The European Convention on Human Rights at 70”

Ba#ak Çal# is professor of International Law and Co-Director at the Centre for Fundamental Rights, Hertie School, Berlin.

Friday, 23 October 2020, 17:00 h (via Zoom/Livestream)

For details and registration see [here](#).

Funded by alumni, friends and former students of Rudolf Bernhardt on the occasion of his 90th birthday in 2015, the Rudolf Bernhardt Lecture honors the life and work of the institute’s director emeritus.

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Covid-19 is on the rise in Germany as everywhere else, and many of the German state governments, being in charge of fighting the pandemic and not knowing what else they could do, resorted to a ban on accommodating tourists. That didn’t stand in court, for the most part. [ALEXANDER THIELE](#) examines how the Bavarian regulation relates to the equality principle in the German constitution.

In Spain, too, government measures against the spread of COVID-19 have met resistance in court. In **Madrid**, a court refused to affirm the local perimeter lockdown. [PATRICIA GARCÍA MAJADO](#) explains that the judgement does not refer to the proportionality of the order, but was rather based on the lack of authorization.

Alarming things are happening with regard to Covid-19 and fundamental rights in **Israel**. A few days ago, the Knesset expanded the authorization to impose a state of emergency, which can now severely restrict freedom of assembly. [TAMAR HOSTOVSKY BRANDES](#) compares the legal situation with Russian dolls and places her hopes in the Israeli Supreme Court to protect fundamental rights, especially with a view to possible early elections.

Can state investigators demand from Google the data of persons who have typed certain keywords into its search engine? Turns out this has already happened in the US. [ALBERT FOX CAHN](#) and [AMANDA HUMELL](#) analyze the legal situation and consider “**keyword search warrants**” a tangible threat to civil society and basic rights.

The German Bundestag’s research service has issued an expert opinion on the legality of US sanctions regarding the **Nord Stream 2** natural gas pipeline project. According to [CHRISTIAN TIETJE](#) and [MARCEL VALENTIN](#), the argumentation is unconvincing in terms of both general international law and international treaty law.

This week, the German Bundestag amended the law on members of parliament, presumably to comply with the BVerfG’s demand to do something about the use of **Bundestag staffers for the parties’ election campaigns**. This did not work, [MATTHIAS FRIEHE](#) states.

Alright, then, I guess I'm done for this week. This has been one long editorial. In case I haven't tested your patience too much already: please pay whichever sum you find adequate via Paypal (paypal@verfassungsblog.de) or bank transfer (IBAN DE41 1001 0010 0923 7441 03, BIC PBNKDEFF). The best thing you could do to keep us afloat would be some sort of regular support, though, such as becoming a member on the great platform [Steady](#). It's very easy and uncomplicated, actually.

Anyway, stay safe and well and all the best,

Max Steinbeis

